No. 91-1600

In the Supreme Court of the United States

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF OF PETITIONERS

JOHN M. HARRINGTON, JR.
Counsel of Record
JOHN H. MASON
ROBERT B. GORDON
PETER L. EBB
ROPES & GRAY
One International Place
Boston, Massachusetts 02110
(617) 951-7000
Counsel for Petitioners

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

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ARGUMENT

I. THE FIRST CIRCUIT'S RULING ON UNDERLYING ADEA LIABILITY IS ERRONEOUS AS A MATTER OF LAW

In the case at bar, and indeed as the briefs of Respondent and his supporting amici curiae[1] themselves make clear, Biggins'

[1] For ease in reference, the amici curiae United States and Equal Employment Opportunity Commission will hereinafter be referred to as the "Solicitor General". Likewise, the amicus curiae National Employment Lawyers Association will be referred to as the "NELA"; and the amicus curiae American Association of Retired Persons will be referred to as the "AARP".

ADEA claim rests upon both an illegitimate legal theory and an inadequate evidentiary foundation. The Court of Appeals' holding that an intent to defeat service-based pension vesting constitutes evidence of age discrimination is clearly erroneous as a theory of ADEA liability. By the same token, Respondent's alternative contention that the decision of the First Circuit may be sustained on the basis of "other" evidence asks the Court to rest a finding of age bias on evidence that will simply not support such an inference.

A. Pension Interference Is Not Age Discrimination

For the reasons fully set forth in Petitioners' principal brief to this Court (at pp. 27-35), the evidence provides no support for the First Circuit's decision to substitute pension interference as a proxy for age under the ADEA. Even if the record permitted the inference that the Hazens were specifically motivated to discharge Biggins from employment to prevent his pension rights from vesting, which it does not,[2] such an inference will still not carry Respondent's burden to demonstrate that his discharge from employment was more likely than not motivated by age bias.

Biggins provides no analytical basis for sustaining the First Circuit's holding that a discharge intended to defeat an employee's seniority-based pension vesting constitutes age discrimination. As Petitioners have argued, considerations of seniority and age are analytically distinct, and cannot be substituted for one another when applying the liability provisions of the ADEA. *See* Brief of Petitioners, at p. 33 and n.27. *See also* *Amburgey* v. *Corhart Refractories Corp.*, 936 F.2d 805, 813 and n.38 (5th Cir. 1991) ("[Plaintiff's] assertions that he was

[2] The contention that Thomas Hazen's offer of a consulting agreement that would cover pension rights might somehow have been construed by the jury as a "not so subtle" threat to *eliminate* Biggins' pension, *see* Brief of Respondent at p. 42, tortures the evidence and subordinates reasonable inference to nonsensical speculation.

told his long seniority and greater severance pay benefits affected the company's decision to terminate him ... are not relevant to age discrimination .... Seniority and age discrimination are unrelated.") (citation and quotations omitted).[3]

The undisputed evidence makes clear that pension vesting at Hazen Paper was a matter wholly unrelated to age, and the Court of Appeals' decision to treat the two as interchangeable

[3] The issue is not, as Respondent has argued, whether interference with pension vesting can *ever* be probative of age discrimination. Rather, the issue before this Court is whether, *on the facts of the case at bar*, pension interference was properly made the basis for ADEA liability. This is precisely the question which Petitioners submitted to the Court in their Petition for Writ of Certiorari, and the suggestion by Respondent that Petitioners have somehow "changed" the issue is bewildering. Nor did Petitioners waive the question presented in their certiorari petition by failing to assert it below. Petitioners consistently maintained both in the District Court and the Court of Appeals that the evidence was legally insufficient to sustain a finding of age discrimination. Further, in response to the Court of Appeals' novel decision equating pension status with age for purposes of ADEA liability, Petitioners requested both rehearing and reconsideration *en banc*, briefing the *identical* question they subsequently presented to this Court. The issue has thus unquestionably been preserved for review. *See Stevens* v. *Department of Treasury*, 111 S. Ct. 1562, 1567 (1991) (where the Court of Appeals entertained and "decided the substantive issue presented," party's failure to raise issue in lower court will not give rise to waiver); *Fernandez* v. *Carrasquillo*, 146 F.2d 204, 206 (1st Cir. 1944) ("When the petition for rehearing is thus considered and disposed of on the merits it has been 'entertained' by the court although the court may deny the petition without setting the case down for reargument and without any written opinion. ... The United States Supreme Court treats the entry of such an order denying rehearing as 'entertainment' of the petition....").

It is, ironically, Respondent himself who is attempting to advance for the first time a contention that he failed to raise earlier. A review of Respondent's Brief in Opposition finds that Respondent raised no waiver argument in opposing certiorari, thus rendering such argument waived going forward. *See City of Canton* v. *Harris*, 489 U.S. 378, 384-85 (1989) (rejecting waiver argument as untimely where not raised in opposition to petition for certiorari); *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815 (1985) (waiver argument not raised in opposition to petition for certiorari held waived: "nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari") (emphasis in original).

is manifest error. Indeed, the Solicitor General virtually concedes such error in his brief as amicus curiae. *See* Brief of the Solicitor General, at pp. 23-25 ("Where, as here, the only criterion for vesting under a pension plan is a reasonably short period of service, and an employee's age is not a factor, there is little ground for inferring that an employer's intention to prevent an employee's pension from vesting is related to age.").[4]

Recognizing that age and pension status had nothing to do with one another in this case, Respondent offers the elliptical theory that Petitioners "used" his pension status as a "weapon" against him in their dispute over a confidentiality agreement, and that this amounted to age discrimination because older persons are more concerned with pension benefits than younger persons. *See* Brief of Respondent, at pp. 31, 39, and 42.[5]

[4] Eager to divorce Respondent's ADEA claim from the insupportable logic adopted by the courts below to sustain it, the Solicitor General has suggested that neither the District Court nor the First Circuit found the alleged intent of the Hazens to interfere with Biggins' pension vesting to be "determinative" to the viability of the claim. *See* Brief of the Solicitor General, at p. 24. (Respondent likewise insists that the courts below affirmed the ADEA verdict through "reliance on the multiple acts of age discrimination engaged in by the petitioners, which were unrelated to pension interference." *See* Brief of Respondent, at pp. 34-35.) This is clearly not so. Both the District Court and the Court of Appeals *explicitly* relied on perceived pension interference to uphold the jury's ADEA verdict. *See* Cert. Pet. A-56 (District Court approving ADEA verdict by ruling that "the jury could reasonably have found that defendants knew of plaintiff's status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights"); *see also* Cert. Pet. A-14 (First Circuit affirming ADEA liability because "the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end").

[5] Respondent appears to concede that pension interference is not discriminatory in *every* case, but claims that it was so in this instance because Biggins was 62 years old. Thus, Respondent asserts:

> "[W]hether the ADEA governs decisions based solely on seniority, or pension status, is meaningless in the context of a situation such as here, where benefits and pension status were used as weapons against Mr. Biggins, because he was sixty-two years old and therefore perceived as being vulnerable to pressure concerning these points. An employee at sixty-two has greater interest in his benefit and pension status than does a younger employee. The older worker may be more likely to face illness or imminent retirement or may not be able to work sufficient time in another job to vest in a pension if he were terminated."

See Brief of Respondent, at p. 39.

Respondent's rhetoric, however, lacks anything even remotely resembling an evidentiary basis. Biggins' extraordinary theory of age discrimination rests upon *assumed* propositions which (as his brief tellingly reflects) cannot be supported with either a single reference to the trial record or a single legal citation. Not one. Indeed, the core of Biggins' argument — *viz.*, that an older worker is "more vulnerable" and has a "greater interest in his benefit and pension status" because he "may be more likely to face illness or imminent retirement or may not be able to work sufficient time in another job to vest in a pension" — posits the very kind of ageist stereotypes decried by the AARP, and should not be credited by this Court.

Furthermore, Respondent's apparent premise, *i.e.*, that a confidentiality agreement required of a 62 year old employee is somehow "discriminatory" because such an agreement visits a relatively greater burden upon him owing to the "particular value" older employees place on pension benefits, is itself open to serious doubt as a basis for ADEA liability. *See Finnegan* v. *Trans World Airlines, Inc.*, 967 F.2d 1161, 1163-65 (7th Cir. 1992) (noting that wage and benefit reductions "unquestionably hit TWA's older workers harder", but rejecting this as a basis for ADEA liability). As the Solicitor General concedes (at p. 24 of his brief), the fact that an employer's action may be burdensome to an older worker is, without more, no evidence that the employer was motivated to take the action *because* of such burden. It can equally be said that every discharge from employment falls more heavily on an older worker, in that it is likely to produce a greater loss of income, defeat more accrued seniority, and the like. Yet, to apply Respondent's logic, every discharge of an older employee could, by itself, be held to constitute age discrimination. The ADEA provides no basis for such a result.

B. The Remaining Evidence Is Not Probative Of Age Discrimination

Without conceding (as the Solicitor General does) that the theory of liability embraced by the First Circuit was erroneous as a matter of law, Respondent maintains that the jury's ADEA verdict can nonetheless be upheld on the basis of *other* evidence. Respondent is wrong. When pension interference is eliminated as a basis for ADEA liability, the remaining evidence permits no rational finding that Petitioners more likely than not discharged Biggins from the Company because of his age.

1. There Is No Evidence That The Hazens' Articulated Reason For Requiring Biggins To Sign A Confidentiality Agreement Was Pretextual

Throughout his brief, Respondent argues that the Hazens' articulated reason for requiring Biggins to sign a confidentiality agreement — *viz.*, their discovery that he had, contrary to prior assurances, been personally marketing services of other businesses to competitors of the Company — was properly found by the jury to be a pretext. In support of this position, however, Biggins advances arguments which will not bear the weight of scrutiny.

First, Biggins suggests that a finding of pretext may be sustained on the mere supposition that the jury chose to "disbelieve" the Hazens' explanation for the proffered confidentiality agreement. This assertion is erroneous as a matter of law. It is well settled that a factfinder's possible disbelief of otherwise uncontradicted testimony will not provide an evidentiary basis for a contrary finding in favor of the party bearing the burden of proof. *See, e.g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Nishikawa* v. *Dulles*, 356 U.S. 129, 137 (1958); *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951); *Roper Corp.* v. *NLRB*, 712 F.2d 306, 310 (7th Cir. 1983); *Federal Ins. Co.* v. *Summers*, 403 F.2d 971, 974 (1st Cir. 1968).

This principle is especially critical to an employment discrimination case, where the law requires the trier of fact to rest a finding of pretext on "substantial evidence" that the employer's articulated reason for action is more likely than not a cover-up for unlawful bias. *See Perfetti* v. *First Nat'l Bank of Chicago*, 950 F.2d 449, 452 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2995 (1992). Accordingly, mere speculation that the jury might have disbelieved the Hazens' testimony will not, without more, suffice to carry Biggins' burden to establish age discrimination.

Respondent next attempts to rest an inference of pretext on the claim that he had informed Thomas Hazen of his son's businesses, and that Mr. Hazen had given Biggins his blessing. *See* Brief of Respondent, at pp. 5, 31, 34. This contention, however, plainly overlooks what is without question *the* essential fact at the heart of the case: the Hazens never knew, until just prior to presenting Respondent with their proposed confidentiality agreement, that Biggins was (contrary to his previous assurances) marketing professional consulting services to Hazen Paper competitors. The undisputed evidence reveals that Biggins was engaged in business ventures in which he personally called on competitors of Hazen Paper; that he did so without the knowledge or permission of his superiors at the Company; and that the fact of Biggins' unauthorized outside activities came to Thomas Hazen's attention only shortly prior to his insistence that Respondent sign a confidentiality agreement.[6] The suggestion, therefore, that Petitioners previously approved the

[6] Respondent's allegation that Thomas Hazen "waited six weeks, until the eve of Mr. Biggins' pension vesting" to express disapproval of Biggins' involvement with W.F. Biggins Associates, Inc. (*see* Brief of Respondent, at p. 34 n.26) is unsupported by the record. To the exact contrary, the evidence showed that Thomas Hazen confronted Biggins with his W.F. Biggins Associates brochure within *days* of receiving the brochure in late April, 1986 (JA 148); and that, thereafter, Mr. Hazen arranged his May 24, 1986 meeting with Respondent within days of confirming the fact that Biggins had personally engaged in business solicitations of a Company competitor named Roger Sullivan (JA 130-31, 149-51.) Respondent's claim of a delay in the Hazens' reaction to his misconduct is thus utterly without basis in the evidentiary record.

business activities which they claim to have prompted their decision to impose a confidentiality agreement on Biggins is simply fallacious.

Finally, Respondent charges that pretext can be located in Thomas Hazen's "lie" to the Massachusetts Division of Employment Security regarding Biggins' separation from the Company. *See* Brief of Respondent, at pp. 29 n.21, 31, 33. This allegation is specious. Thomas Hazen clearly had a good faith basis for asserting that Biggins' termination amounted to a "voluntary quit". By his own admission, Biggins could have retained his job at Hazen Paper had he not insisted on receiving $100,000 in compensation as a precondition to signing a confidentiality agreement. *See Wagstaff* v. *Director of Division of Employment Security*, 322 Mass. 664, 79 N.E.2d 3 (1948) (denying benefits to claimant leaving work after being denied requested pay increase). Respondent's job with Petitioners was thus plainly his to keep, provided he covenanted not to aid competitors of the Company. Biggins simply refused, unless his salary were increased to $100,000 per year. Under these circumstances, it was altogether reasonable for Thomas Hazen to treat Respondent's rejection of this condition of employment as tantamount to a voluntary resignation, and to contest his claim for unemployment benefits on that basis.[7] *See W. Holloway & M. Leech, Employment Termination/Rights and Remedies* (1985) at p. 110 (discharge based on employee's refusal to obey "reasonable request" may be viewed as voluntary quit). Respondent's charge of dishonesty against Mr. Hazen simply cannot be supported by any reasonable view of the evidence; and, even if it could, such a charge would still not permit an inference of *age discrimination*.

[7] Even Biggins himself testified that Thomas Hazen's *contemporaneous* assessment of the termination reflected his personal view that Biggins was not being discharged. *See* JA 88 ("He said, 'I am not firing you. I don't know what I'm doing to you, but I'm not firing you.' ").

2. Requiring Respondent To Sign A Confidentiality Agreement Had Nothing To Do With Biggins' Age

Respondent insists that age discrimination can be inferred from the fact that the Hazens required Biggins to sign a confidentiality agreement which they did not impose on other (younger) employees. There was no evidence, however, that any other employee occupied the sensitive managerial position that Biggins did as Technical Director and a member of Hazen Paper's Executive Committee. Nor was there evidence that any other employee had ever marketed services of a company bearing his own name to competitors of Hazen Paper. Since the conflict of interest posed by Biggins' competitive business activity was the very reason given by Petitioners for their decision to impose a confidentiality agreement upon him, the fact that younger employees not shown to occupy like positions or to have engaged in like behavior were not required to sign such an agreement is in no way probative of age bias. *See Texas Dep't. of Community Affairs* v. *Burdine*, 450 U.S. 248, 258 (1981) ("it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally") (emphasis added); *Mitchell* v. *Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992) ("It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly situated in all respects") (emphasis in original); *Sherrod* v. *Sears, Roebuck & Co.*, 785 F.2d 1312, 1315 (5th Cir. 1986) (same); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (same).[8]

[8] Even the Solicitor General appears to recognize the immateriality of the Hazens' failure to require confidentiality agreements of other technical employees not engaged in business activities with competitors, tentatively describing such evidence as "arguably differential treatment of younger employees." *See* Brief of the Solicitor General, at p. 24. This noncommittal characterization aligns with the Solicitor General's overall view of Biggins' evidence of age discrimination as "not strong", and with his suggestion that the case be remanded to the First Circuit for further consideration of the evidence's legal sufficiency. *Id.* at pp. 24-25.

Respondent similarly argues that the confidentiality agreement offered to him by Hazen Paper was "discriminatory" because it imposed a longer non-competition obligation than that required of his replacement. Once again, however, this fact is in no way probative of the charge that Biggins was offered such an agreement (and discharged when he refused to sign it) because of his age. The evidence showed that the Hazens did require Biggins' replacement (Timothy McDonald) to sign a confidentiality agreement. While the non-competition period provided for in Mr. McDonald's agreement was somewhat shorter than that proposed for Biggins, Biggins had in fact already been engaged in questionable business dealings with Hazen Paper competitors. Biggins' situation was thus not comparable to Mr. McDonald's in this particular respect; so no reasonable inference can be drawn that considerations of age account for the differences in their respective contracts. *See Burdine, supra* at p. 258; *Lanear* v. *Safeway Grocery*, 843 F.2d 298, 301 (8th Cir. 1988) ("[plaintiff's] claim of disparate treatment must rest on proof that he and his [co-worker] were similarly situated in all relevant respects"); *EEOC* v. *Sperry Corp.*, 852 F.2d 503, 510-11 (9th Cir. 1988) (same).

In addition to the foregoing, there was no evidence that Biggins could not have had a shorter non-competition period in his employment agreement had he asked for it. Thomas Hazen testified without contradiction that the arrangements offered to Biggins were "negotiable", and Biggins introduced no evidence that he ever informed the Hazens that the non-competition clause contained in the proposed contract was objectionable to him. (JA 161.)[9] Rather than attempt to negotiate this point, Biggins took the position that the proposed agreement was

[9] Indeed, Robert Hutchinson testified that two-year non-competition agreements of the sort offered to Biggins are "common" in the paper industry. (JA 120.) More generally, this Court may take judicial notice that the confidentiality agreement tendered to Biggins was altogether characteristic of the kinds of agreements employers routinely use to protect their trade secrets. *See* M. Epstein, *Modern Intellectual Property* (2d ed. 1991), at pp. 52-53, 317-46.

acceptable on its face, but that he would sign it only if the Company met his $100,000 salary/stock demand. (JA 84, 86-87.) The Hazens flatly refused (and nothing in the record suggests they paid such a sum to Biggins' replacement), and the parties never got beyond the impasse. That Respondent's successor — by not insisting on an overly generous compensation package — may have *ultimately* negotiated a less restrictive non-competition covenant cannot possibly support an inference of age discrimination.

3. Two Isolated And Inconsequential Remarks Are Irrelevant To Biggins' Age Discrimination Claim

Finally, Respondent attempts to rest an inference that considerations of age more likely than not motivated his discharge upon two stray remarks purportedly made by Thomas and Robert Hazen referring to Biggins' age. At trial, Biggins testified that Thomas Hazen once stated — at some indefinite time after the Company had provided members of its Executive Committee with life insurance policies — "that it was costing him a lot more for [Biggins'] policy because [he] was so old." In addition, Biggins testified that, sometime back in 1985, Robert Hazen joked that Biggins' Company-sponsored membership in a handball court "would not do [him and a fellow executive] much good because they were so old." *See* Cert. Pet. A-12-A-13, A-56.

These two fragmentary comments — innocuous in content, isolated in a bias-free history of almost ten years' employment (begun when Biggins was already 52 years old), and unrelated to and temporally remote from the relevant decisions at issue — are insufficient to sustain a finding that the Hazens' true reason for terminating Biggins' employment was his age. Numerous courts have recognized that such stray remarks are simply not probative of whether a subsequent employment action was impermissibly based on discriminatory considerations. *See, e.g., Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9-10 (1st Cir. 1990) (supervisor's remark "that 'the sales personnel

was [sic] getting too old' and that this was a 'problem' for the company" did not give rise to inference of discriminatory discharge); *Haskell* v. *Kaman Corp.*, 743 F.2d 113, 120 (2d Cir. 1984) (company president's description of two older employees as "old ladies" and approving references to younger employees as "young turks" were not probative of age discrimination); *Smith* v. *Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980) (statements by supervisor that employer's "future lay in its young" personnel held to be merely "truisms" not probative of discriminatory purpose); *Guthrie* v. *Tifco Industries*, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992) (former president's repeated comment that younger successor "would need to surround himself with people his age" held to be "no more than 'stray remarks,' which are insufficient to establish discrimination"); *Gagne* v. *Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (supervisor's "isolated" statement that he "needed younger blood" held to be "too abstract, ... irrelevant and prejudicial to support a finding of age discrimination"); *Smith* v. *Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989) ("[Stray] remarks, ... when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue").[10]

[10] Lower courts have likewise held that isolated remarks *far* more age-biased in character than the two quips ascribed to the Hazens will not suffice to permit a reasonable inference that a particular employment decision was more likely than not motivated by discrimination. *See, e.g.*, *Gartland* v. *Hermetic Seal Corp.*, 53 FEP Cases 1414, 1415 (D. Mass. 1990) (supervisor's statement that "we should get bright young people in" and that he wanted to "get rid of deadwood" did not permit inference that plaintiff's discharge was motivated by age bias); *Shostak* v. *United States Postal Service*, 662 F. Supp. 158, 161 (D. Me. 1987) (supervisor's remark that plaintiff was "too old for the job" not sufficiently probative of age discrimination to establish pretext); *Carpenter* v. *American Excelsior Co.*, 650 F. Supp. 933, 938 (E.D. Mich. 1987) (office manager's statements that he liked his salespeople "young, mean and lean" and that plaintiff "was not as young as he used to be" held insufficient evidence to give rise to an inference of age-based discrimination); *Cash* v. *American Honda Motor Co.*, 45 FEP Cases 1520, 1521 (N.D. Ga. 1987) (sales manager's isolated references to plaintiff as "old fart" and "grandpa" did not permit inference that discharge was product of age discrimination); *Long* v. *Chesapeake and Ohio Ry. Co.*, 42 FEP Cases 990, 998 (E.D. Va. 1986) (employees' allegations that union officers referred to them as "old women", "dead wood", "deteriorating" and "stagnant" held insufficient to establish that union acted with age-based motivation); *Berkowitz* v. *Allied Stores of Penn-Ohio*, 541 F. Supp. 1209, 1218-19 (E.D. Pa. 1982) (executive's lone remark that 57 year-old plaintiff had "been around since the dinosaurs roamed the earth" held insufficient to permit inference that stated reasons for discharge were pretextual).

Rationally viewed, the evidence here is insufficient as a matter of law to sustain the jury's age discrimination verdict. It was, undoubtedly, this very absence of evidence relating to age which led the First Circuit into the error of relying on pension interference to support Biggins' ADEA claim. Taken singly or as a whole, the relevant evidence permits no reasonable inference that Petitioners' articulated reasons for discharging Biggins from their employ are more likely than not pretexts designed to mask unlawful age bias.[11]

II. THE *THURSTON* TEST FOR LIQUIDATED DAMAGES SHOULD BE MODIFIED FOR USE IN INDIVIDUAL DISPARATE TREATMENT CASES

Petitioners submit that the *Thurston* test for liquidated damages should be modified to allow for use in individual discriminatory treatment cases.[12] As the majority of courts that

[11] To the extent that Respondent introduced evidence of *any* motivation other than the Hazens' concern over his outside activities with competitors, such motivation consisted exclusively of Thomas Hazen's irritation with Biggins' repeated demands for increased compensation, as well as a purported desire to avoid fulfilling a promise for Company stock. Far from supporting Respondent's ADEA claim, however, such evidence "would not show age discrimination. It would merely provide another reason, totally unrelated to age, for his discharge." *Dea* v. *Look*, 810 F.2d 12, 15 (1st Cir. 1987).

[12] Contrary to the suggestions of Respondent and the AARP, Petitioners are not urging that this Court adopt two different definitions of the term "willful", one for discriminatory treatment cases and one for disparate impact cases. Rather, Petitioners maintain that this Court should simply refine the definition of willful approved in *Thurston*, so that it can preserve the punitive nature of liquidated damages in *both* types of cases.

have addressed the issue recognize, modification of the "knew or showed reckless disregard" standard is necessary to avoid the virtually automatic imposition of double damages in every disparate treatment case in which predicate liability is found. *See* Brief of Petitioners, at pp. 38-43. In their briefs to this Court, Respondent and the amici supporting him argue on various grounds that the *Thurston* test is capable of preserving distinct tiers of predicate and punitive liability — even in individual disparate treatment cases — and that the test should therefore remain unchanged. These arguments are addressed seriatim.

A. The Standard Of Willfulness Urged By Petitioners Preserves The Distinction Between Predicate And Punitive ADEA Liability

All parties (save the AARP) agree that liquidated damages for "willful" violations of the ADEA were meant to be punitive, that is, reserved for exceptional cases in which an employer's acts of age discrimination are especially culpable. As the Solicitor General states, "[t]here is no question that Congress intended ADEA double damages to be 'punitive', in the sense that they would be awarded in cases where an employer met (or rather failed) a higher standard of culpability than that required for simple liability." *See* Brief of the Solicitor General, at p. 17.[13]

[13] The NLEA's observation that liquidated damages (which, when assessed, replace otherwise recoverable prejudgment interest) have a compensatory element does not alter the fact that Congress selected the *criminal* penalties provision of the Fair Labor Standards Act (FLSA) to govern the awarding of such damages. Thus, as this and numerous other courts have consistently recognized, liquidated damages under the ADEA were intended to be punitive, and are properly subject to a punitive standard. *See* Brief of Petitioners, at p. 37. The AARP's contrary argument that liquidated damages are purely compensatory, *see* Brief of the AARP at pp. 10-13, is without merit. Relying upon Congress's express adoption of a criminal standard as the benchmark for awarding double damages under the ADEA — distinguishing such damages from the compensatory double damages awarded automatically under the FLSA — this Court declared in *Thurston* that the ADEA's provision for liquidated damages in cases of "willful" violations was "punitive in nature". *See Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125 (1985).

Having acknowledged the need for a willfulness standard that distinguishes ordinary from punitive liability, Biggins and his supporting amici insist that *Thurston*'s "knew or showed reckless disregard" test is sufficient to the task. It is first suggested that "disparate impact" cases comprise a class of ADEA actions in which specific intent to discriminate is not a requirement of an underlying violation, and that such cases thus involve claims in which ordinary liability will not carry with it an automatic finding of willfulness under *Thurston*. That Congress could not have intended the line between willful and nonwillful violations to be drawn at disparate impact cases, however, is plain for two reasons. First, Congress enacted the ADEA in 1967, fully four years before this Court conceived the theory of adverse impact liability under Title VII. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). It is thus doubtful that Congress had disparate impact cases in mind when it reserved liquidated damages for violations of the statute that are "willful".[14] Furthermore, a recent survey of civil rights cases revealed that suits alleging disparate impact make up less than 2% of all employment discrimination litigation. *See* Donahue and Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 998 n.57 (1991). Once again, Congress could not have intended a test for willfulness liability that allows liquidated damages to be assessed in 98% of all ADEA cases, particularly given this Court's explicit rejection of willfulness standards that result in "an award of double damages in almost every case." *Thurston*, 469 U.S. at 128.[15]

[14] *See also* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982) (arguing that Congress did not contemplate disparate impact liability when enacting the ADEA); *cf. International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.").

[15] Had Congress intended for liquidated damages to be awarded in all or virtually all cases in which a predicate ADEA violation is found, it would not have included an express provision in the statute for double damages reserved for "willful" violations. Instead, it would have done what it did in enacting

Respondent and his amici likewise argue that the availability of a small number of affirmative defenses under the ADEA (*viz.*, exemptions for actions taken pursuant to a bona fide employee benefit plan or seniority system, or where age is a bona fide occupational qualification) permit situations in which an employer violates the statute in the mistaken belief that its actions are legally permissible. It is suggested that these limited defenses preserve the notion of two-tiered liability in disparate treatment cases, even under the "knew or showed reckless disregard" standard of *Thurston*. This argument, however, is off the point, because it only addresses cases which (like *Thurston*) involve company-wide policies or plans — *i.e.*, employee benefit plans, seniority systems, and age requirements for jobs. In these types of cases, an employer can violate the ADEA without specifically *intending* to do so; and this potential, in turn, allows for a distinction to be drawn between willful and non-willful violations of the statute as defined by *Thurston*.[16] In an individual disparate treatment action, by contrast, such potential is foreclosed by the very finding which the jury is required to make in order to attach predicate liability — namely, that an employer's articulated reason for an adverse employment action is a pretext masking an unlawful intent to discriminate. For this reason, Respondent and the amici do not — and cannot — explain how a finding of discrimination in an individual disparate treatment case will allow for an employer to

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the FLSA — *viz.*, authorize an award of double damages for each and every violation of the statute. *See* 29 U.S.C. § 216(b). Applied without modification, the *Thurston* standard comes close to rendering the word "willful" superfluous, a result at variance with well settled principles of statutory construction. *See* N. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . .").

[16] The same is true of the various other federal statutes providing for willfulness liability cited to the Court by Respondent and the Solicitor General. *See* Brief of Respondent, at pp. 20-21 n.11; Brief of the Solicitor General, at p. 10 n.3. In contrast to the ADEA, none of these statutes require *specific intent* to establish underlying violations of the law.

evade automatic willfulness liability. No explanation is possible because, as most circuits have recognized, an undifferentiated application of *Thurston* to this (most prevalent) type of discrimination claim virtually necessitates a finding of willfulness.[17]

In a further attempt to disjoin individual age discrimination claims from *Thurston*'s definition of a "willful" ADEA violation, the Solicitor General and NELA point to decisions of the Seventh Circuit suggesting that an employer may commit an act of disparate treatment, yet do so with something less than a specific intent to discriminate. *See* Brief of the Solicitor General, at pp. 14-15; Brief of the NELA, at pp. 15-16. The Seventh Circuit has reasoned that an employer can discriminate through reliance on "unconscious stereotypes", thus allowing for a distinction between knowing and unknowing violations of the statute. *See, e.g., Castleman* v. *Acme Boot Co.*, 959 F.2d 1417, 1423 (7th Cir. 1992); *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 156-57 (7th Cir. 1981). Prescinding from the questionable premise that an employer can somehow discriminate on the basis of age without knowing or intending to do so, it would be folly for this Court to adopt so elusive a distinction between willful and non-willful violations of the ADEA. A legal standard for willfulness that required lay juries

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[17] The Solicitor General, like the First Circuit, appears to concede as much: "It is of course true that in many cases such as the present one, where no defenses or exceptions are involved, employers found liable for individual acts of age discrimination will find it difficult to show that their actions were not willful under the *Thurston* standard. . . . It is to be expected that in any case that does not involve possible affirmative defenses or questions of coverage, a decision by an employer . . . to fire . . . an individual because of his age would generally be viewed as 'willful' under any plausible definition of the term." *See* Brief of the Solicitor General, at pp. 15-16. *See also* Brief of the NELA, at p. 20 ("More times than not, disparate treatment cases involve conduct which meets the 'knew' or 'reckless disregard' standard."). Stated simply, because a finding of predicate liability represents an adjudicated conclusion that the employer acted "because of" the plaintiff's age, such ordinary liability will — with an unmodified application of *Thurston* — produce an automatic imposition of punitive damages.

to distinguish conscious from unconscious states of mind when evaluating employment decisions would ensure both a hopelessly confused fact-finder and a highly speculative verdict. As Justice O'Connor observed in a kindred context, such an endeavor would "challenge[ ] the imagination of the trier to probe into a purely fanciful and unknowable state of affairs." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (quotation omitted).

B. A Modified Thurston Standard Is Fully Consistent With The Language And Intent Of ADEA Section 7(b)

Petitioners have urged an interpretation of "willful" that authorizes liquidated damages only in cases where the employer's actions meet a higher standard of outrageous or egregious conduct. This requirement fulfills Congress's intent to create two tiers of ADEA liability, with liquidated damages reserved for cases where the employer's culpability is sufficiently aggravated to warrant a punitive sanction.

The Solicitor General argues that the various courts that have so modified *Thurston* have diverged from the statutory language of ADEA § 7(b). The government maintains that to supplement *Thurston* "with an additional requirement of 'outrageous' conduct is to substitute a court's notion of the proper standard for enhanced liability for that specified by Congress." *See* Brief of the Solicitor General, at p. 18.[18] This is simply not

[18] Respondent similarly argues that the term "willful" has a "plain" and "unambiguous" meaning. *See* Brief of Respondent, at pp. 12-14. This is an obvious overstatement. It can hardly be gainsaid that there are "various meanings that the term 'willful' has come to bear in different legal settings." *See McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 137 (1988) (Marshall, J., dissenting) (noting that "the dictionary includes a wide variety of definitions of 'willful', ranging from 'malicious' to 'not accidental' "). Moreover, Biggins' argument that "willful" is a term of plain meaning is undermined by Respondent's own lengthy recitation of the splintered interpretations of the term that have been taken by the circuit courts. *See* Brief of Respondent, at pp. 22-30.

true. The Solicitor General's argument treats *Thurston*'s definition of willfulness as though it were codified in the statute itself. As numerous courts and commentators have recognized, however, the "knew or showed reckless disregard" test approved in *Thurston* was merely an *interpretation* of the statutory standard of "willful". A different interpretation of this term to allow for use in cases different in kind from *Thurston* is no less faithful to the statute's language than was *Thurston* itself. *See* Charland, *Willfulness, Good Faith, and the Quagmire of Liquidated Damages Under the Age Discrimination in Employment Act*, 13 J. Corp. Law 573, 596 (1988) ("The Court [in *Thurston*] confined its holding to a relatively narrow point. It rejected some expounded definitions ... but did not render a blanket rejection of all possible definitions of willful.").[19]

In establishing its one-word standard for liquidated damages, Congress employed a term of elastic definition — one whose meaning could be developed as necessary to fulfill the statute's basic intent. Neither Respondent nor his supporting amici curiae offer any principled reason for an inflexible adherence to the language of *Thurston*. Indeed, given its consequence of imposing virtually guaranteed liquidated damages in individual disparate treatment cases, the *Thurston* standard cannot be reconciled with Congressional intent and should be modified.

[19] Indeed, it would appear that this Court has invited the very kinds of refinement to the term "willful" here urged by Petitioners. In *Thurston*, the Court characterized the Second Circuit's "knew or showed reckless disregard" standard as "*an* acceptable way to articulate *a* definition of 'willful'." 469 U.S. at 129 (emphasis added). Likewise, in *Richland Shoe*, the Court held that "knew or showed reckless disregard" was "*a* fair reading" of the statutory language. 486 U.S. at 133 (emphasis added). To say merely that a particular standard is "an acceptable" or "fair" reading of "willful" by no means announces a *compulsory* construction of the term. Rather, *Thurston* and *Richland Shoe* simply held that "knew or showed reckless disregard" was one permissible definition of willful, and that, on the facts presented, such a standard was not satisfied by the evidence. Nothing in either case suggests that the Court would not refine the standard further when presented with an appropriate case for so doing.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

JOHN M. HARRINGTON, JR.
Counsel of Record
JOHN H. MASON
ROBERT B. GORDON
PETER L. EBB
ROPES & GRAY
One International Place
Boston, MA 02110-2624
(617) 951-7000

Counsel for Petitioners

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